IN THE

Supreme Court of the United States

October Term, 1978
No. 78-1144

LEONARD M.,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

BRIEF OF RESPONDENT IN OPPOSITION

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Opinion Below

The order finding petitioner to be a person within the meaning of section 602 of the California Welfare and Institutions Code and directing a suitable placement for him was affirmed by the California Court of Appeal, Second Appellate District, Division Four, on October 27, 1978, in an opinion certified for publication (App. A). (See 85 Cal.App.3d 887, ... Cal.Rptr. .....) The Supreme Court of California denied a petition for hearing on January 3, 1979.[1]

Jurisdiction

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code section 1257(3).

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[1]Petitioner's Petition for Writ of Certiorari will hereinafter be referred to as "Petn."

Question Presented

Whether due process requires the appellate courts of a state to apply the same standard of proof as the trial court when reviewing a conviction; that is, whether the reviewing court must determine that the petitioner's guilt was established beyond a reasonable doubt as opposed to determining whether there is sufficient evidence to sustain the finding of guilt.

Statement of the Case

In a petition filed by the Acting Chief Probation Officer of Los Angeles County it was alleged that petitioner was a minor who came within the provisions of section 602 of the California Welfare and Institutions Code. In paragraph one, it was alleged that petitioner committed a lewd act on a child under 14 years of age, a violation of section 288 of the California Penal Code. In paragraph two, it was alleged that petitioner participated in oral copulation, a violation of section 288a of the California Penal Code. (C.T. p. 1.)[2]

Petitioner denied the allegations of the petition. (C.T. p. 2.) Petitioner's motion to dismiss the allegations pursuant to section 1118 of the California Penal Code was denied. (C.T. p. 8.)

The court found the allegations within paragraph one to be true and sustained the petition. Paragraph two was dismissed with prejudice. Petitioner was found to be a person described by section 602 of the California Welfare and Institutions Code. (C.T. p. 10.)

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[2]The references in this section and the following sections are to the reporter's transcript (R.T.) and clerk's transcript (C.T.) of petitioner's hearings in the Los Angeles County Superior Court.

Petitioner's motion for a new adjudication was denied. The court declared petitioner to be a ward of the court pursuant to section 602 of the California Welfare and Institutions Code. Petitioner was ordered suitably placed and the probation officer was authorized to provide medical, surgical, dental, or other remedial care. (C.T. pp. 12-13.)

Petitioner appealed the juvenile court's findings and order, arguing that he had received constitutionally ineffective assistance of counsel in that his counsel did not seek a psychiatric examination of the complaining victim and that the evidence was insufficient to support a finding that he violated Penal Code section 288. (A.O.B. pp. 44-82.)[3] In an opinion certified for publication by the California Court of Appeal, Second Appellate District, Division Four (Jefferson J., dissenting), the Court of Appeal affirmed the findings and order of the juvenile court by holding the evidence of the victim's testimony sufficient to sustain the finding of a Penal Code section 288 violation[4] and that the record did not support the argument that petitioner's counsel had been constitutionally ineffective. (App. A.)

Petitioner's petition for hearing filed by his appellate counsel and an *amicus curiae* petition filed by the California State Public Defender were denied by the California Supreme Court. The instant petition for writ of certiorari filed in this Court followed.

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[3]References to Appellant's Opening Brief on appeal in 2D Crim. 30946 are hereinafter designated as "A.O.B."

[4]Petitioner alleges that the evidence shows that it was a medical impossibility for the victim to have been raped. (Petn. p. 11.) It should be noted again that petitioner was not found guilty of having committed rape (Cal. Pen. Code § 261) but of having committed lewd acts on a minor (Cal. Pen. Code § 288).

Statement of Facts

On the date of the incident involved, five-year-old Perele Manela was in her back yard with her brother, Yossi, who was four. Petitioner, whom Perele knew lived next door, was on the other side of a wooden gate to the yard. Petitioner told Perele, "Come over to my house." (R.T. pp. 7-9.)

Perele left her yard, joined by her brother, and went into petitioner's house through the front door. Once inside petitioner's house, petitioner said, "Be quiet because someone is sleeping." (R.T. pp. 9-11.)

They went into a room in which Perele saw a chair. Petitioner said that he wanted to play "Emergency" with Perele. Perele had played "Emergency" and "Hospital" on prior occasions with her brother. In those games someone would pretend to get sick, be taken to the hospital, and then get better. When Perele and Yossi played the game, Yossi would pretend to touch Perele. (R.T. pp. 11-13, 94-96.)

Petitioner told Perele to lie down on the floor. Perele, who was wearing a dress and panties, did so. (R.T. pp. 13-14.)

Petitioner, who was wearing a shirt and pants, got on top of Perele. Perele had never heard of a boy lying on top of a girl nor had petitioner told her about boys lying on girls. Petitioner pulled down his pants and underpants. He then pulled Perele's panties down to her knees. (R.T. pp. 15-16, 99.)

While directly on top of Perele, who was lying on her back, petitioner put his "nooney" into Perele's "nooney." The word "nooney" referred to the genital areas. Perele used these terms to refer to the penis and vagina. (R.T. pp. 18, 49, 111-112.)

Perele felt petitioner's "nooney" go inside of her. It began to hurt Perele and she said "Ow" loudly. Petitioner continued putting his "nooney" into Perele. (R.T. pp. 18-19, 49.)

When petitioner stopped, he told Perele that she could go home. Perele pulled up her panties, but before she left petitioner said, "You can't go right now; have to wait a while." Perele waited a little while and then went home. (R.T. p. 19.)

Perele had played "Emergency" with petitioner at his house on several prior occasions, but petitioner had not hurt her like he did on this occasion. On one occasion petitioner had licked Perele's "nooney." Petitioner had only lain on Perele on this one occasion. (R.T. pp. 21, 100.)

Perele's mother, Mrs. Rose Manela, was in the dining room of her residence on June 21, 1976, at approximately 11:30 a.m. To her knowledge, Perele and Yossi had been playing outside for about two and a half hours. (R.T. pp. 106-107.)

At around 11:30 a.m., Perele came into the house and complained to her mother that a sexual offense had been committed. She said that "[t]he boy next door, the motorcycle boy," had committed the sexual act upon her. Petitioner was the only boy who lived near the Manelas. No other 16-year-old boys lived in the immediate vicinity. Mrs. Manela also knew that petitioner frequently rode motorcycles and had one of his own. (R.T. pp. 20, 107-109, 116, 140.)

Mrs. Manela wanted to know when the incident had happened. Perele said, "Just now." Mrs. Manela examined Perele immediately. She lowered Perele's pants and saw that Perele's vaginal area was reddish

in color, but did not see any blood. Mrs. Manela had never seen that condition with respect to Perele's vaginal area prior to that day. (R.T. pp. 109, 113, 114.)

That afternoon Mrs. Manela took Perele to the park to play. She did not take Perele to the hospital until that evening. Mrs. Manela waited because she wanted to talk to petitioner's mother before doing anything. She thought that a conversation with petitioner's mother might clear up the matter so that the police would not have to be brought in. (R.T. pp. 110, 121-122, 124-125.)

At about 5 to 6 p.m. on the 21st, Mrs. Manela had a conversation with petitioner's mother. Mrs. Manela was hoping that petitioner's mother would show her concern and indicate her intention to speak to petitioner and prevent a further occurrence of such incidents. Instead, petitioner's mother gave a "cool" response. She stated, "We frequently discuss sex. Therefore, it couldn't have happened. It didn't happen that way." Mrs. Manela understood "we" to mean petitioner and his mother. (R.T. pp. 110-111, 125, 142.)

Celso Chavez was a duly licensed physician on June 21, 1976. At about 8:30 p.m. he treated five-year-old Perele Manela at Citizen's Emergency Medical Group in Hollywood. Perele had been brought in by her mother. (R.T. pp. 52, 54-55.)

At the time, Perele was somewhat anxious and tearful. She explained to Dr. Chavez what had occurred, becoming more tearful and anxious. Dr. Chavez did not examine Perele until he had calmed her down. (R.T. pp. 55, 61, 65.)

Upon giving Perele a genital examination, he found that there was clear secretion in the introitus of the vagina. There was erythema of the labia, meaning redness and swelling of the vagina, both in the outer and inner lips of the labia. Normally, that area is pale to pinkish in color. There was also tenderness to palpation. There was no evidence of bleeding, laceration, or hematoma. The hymen was intact. (R.T. pp. 55-56, 79.)

Assuming that what had occurred to Perele's vagina occurred at approximately 11:00 to 11:30 a.m. that day, there would have had to have been a substantial degree of force or trauma applied to that area for the inflammation to be present at 8:30 p.m. It was possible that a sexual contact between 11:00 and 11:30 a.m. caused the inflammation and tenderness observed by Dr. Chavez. (R.T. pp. 57-58.)

It was also possible that a contact with a hard object, such as a piece of furniture, could cause such trauma. However, when there is contact with such objects, a contusion, hematoma, and possible laceration would probably be found. None of these conditions were found by Dr. Chavez. (R.T. pp. 58-59.)

The trauma might also have resulted from a fall. Again, however, evidence of laceration, contusion, and hematoma would be expected after a fall, all of which were lacking as to Perele. (R.T. p. 59.)

Dr. Chavez had seen children who had been injured on park-type apparatus such as monkey or climbing bars. Usually in such cases there would be other areas of trauma or laceration. It would be rare that the area of trauma as a result of such an incident would be as localized as it was on Perele's vaginal area. (R.T. p. 73.)

It was possible for a penis to have penetrated Perele's vagina to a sufficient degree to have caused the trauma noted by Dr. Chavez, and yet not to have pierced or penetrated the hymen. In such a case, the farthest the penis could have penetrated without rupturing the hymen was one-fourth of an inch. (R.T. pp. 60, 75.)

Assuming the penis of a normally developed sixteen-year-old male had been placed at the outermost portion of a five-year-old child's vagina in a manner insufficient to have resulted in penetration or the rupture of the hymen, it was still possible to have the resultant trauma noticed by Dr. Chavez in addition to the feeling of substantial pain by the child. Whether there would be any bleeding would depend upon the degree of irritation and actual length of contact. However, the lack of bleeding would not preclude the possibility that the penis had been in the outermost portion of the vagina. (R.T. pp. 60-61.)

Dr. Chavez found a white or moist mucus or liquid inside of Perele's vagina. Assuming that tests on the liquid resulted in a negative for sperm, given the trauma at the vaginal areas, the liquid could have resulted as a discharge or secretion from the actual inflammation of the tissue. Dr. Chavez did not believe that the irritation present there was the result of an infectious process. The trauma was too localized. Furthermore, such an infection would have produced a purulent discharge—a thick, yellow to green, maladorous discharge. (R.T. pp. 61, 81-82.)

Approximately a week later, Perele and her mother were walking on the sidewalk by their home. Perele pointed in a direction and said, "That's the boy." Mrs. Manela looked in that direction and saw petitioner. (R.T. pp. 140-141.)

Defense

On June 19, 1976, Eileen Mann, petitioner's mother, saw petitioner at around 6:30 a.m. She then went to the beauty shop, returning home around 8:15 a.m. Mrs. Mann left thereafter with her parents and was out of the house until 3:30 p.m. (R.T. pp. 248-249.)

At around 8 a.m. on June 19, petitioner arrived at Edward Wiener's house in Northridge. Petitioner was there to help Mr. Wiener move to Rolling Hills Estates. Petitioner helped Mr. Wiener on one trip hauling items to the new home. This trip was not completed until 3:30 or 4:00 p.m. at which time petitioner went home on his motorcycle because he was tired. (R.T. pp. 199-202.)

Petitioner returned home at around 5 p.m. He did not look well and Mrs. Mann asked, "What's the matter?" Petitioner took off his motorcycle helmet and said, "I'm going to go 'lay' down. I've got a terrible headache." (R.T. p. 250.)

Petitioner went into his bedroom. Mrs. Mann checked on petitioner every half hour or so. At around 11 p.m. Mrs. Mann went to bed, at which time she found petitioner watching the television in his room. Mrs. Mann did not see or hear Perele Manela in the Mann house on June 19. (R.T. pp. 250-251.)

On June 20, petitioner was in his bedroom until early afternoon. He had a terrible headache and a cough which was changing in sound. During the time he was in bed, petitioner watched television. (R.T. p. 656.)

Petitioner finally got out of bed to eat, thereafter returning to bed. At around 3 p.m., petitioner said that he was feeling better; his headache had diminished

although his cough still lingered. Petitioner said he was going to the garage to write a letter. (R.T. pp. 256-257.)

Petitioner went outside. He later came back in and read the thank you letter he had written. Petitioner then went back to the garage to tinker with his motorcycle. (R.T. pp. 257-258.)

At about 7:30 p.m., petitioner left in response to a fire call he had heard on his scanner. He was gone for 45 minutes to an hour after which he returned and remained at home. Mrs. Mann did not see Perele Manela in the Mann home on June 20. (R.T. pp. 258-259.)

Milton and Lillian Litt, the grandparents of petitioner, lived on the second story and owned the building wherein petitioner and his mother lived. On June 21, 1976, Milton Litt left the house at 7:15 or 7:20 a.m. to go to Britt's Holland House for coffee. At around 8:30 a.m., Mr. Litt decided to do some shopping and called his wife to tell her not to worry about where he was. (R.T. pp. 215-217.)

Mr. Litt went to Cooper's on Pico. He waited for the store to open at 9 a.m. At 9:30 a.m., Mr. Litt returned home in his car whereupon he unpacked the car and began watering the front lawn. (R.T. p. 217.)

At 9:45 or maybe 10:00 a.m., Mr. Litt was called by his wife to have breakfast. He went upstairs, ate breakfast, and took some medication which made him drowsy on occasion. Mr. Litt then returned downstairs to continue watering at about 10:20 a.m. (R.T. pp. 218-219, 230, 234.)

About 10 minutes later, Mr. Litt went into the area where petitioner lived in order to go to the bath-

room. He did not expect petitioner to be home and was surprised when he heard coughing. Mr. Litt went to petitioner's bedroom and found him lying in bed. When Mr. Litt asked petitioner what had happened, petitioner stated that children do not like the sound of coughing and petitioner had been sent home from work. (R.T. pp. 219-221.)

Thereafter, Mr. Litt finished watering and went upstairs to rest on the front porch at about 10:30 a.m. From where he was, Mr. Litt could see the street and sidewalk. He sat there about half an hour, but did not see petitioner go in or out of the front door. He also did not see any children on the street. (R.T. pp. 221-223.)

At around 11:05 a.m., Mr. Litt decided to go into the back yard in order to put on the coupling of a broken hose. While back there, Mr. Litt did not hear the sounds of children anywhere. (R.T. pp. 223, 231.)

Mr. Litt was unable to put the coupling in the hose. He called to petitioner indicating that he had some problems. Petitioner appeared at the screen door in the back room and indicated that Mr. Litt needed to purchase a male coupling instead of the female coupling he had. Petitoner did not say anything about the dryer or a repairman. (R.T. pp. 223-224, 244, 247.)

It was about 11:15 a.m. when Mr. Litt saw that petitioner was correct about the coupling. He decided to "call it a day" since he did not feel well enough to go back to Cooper's for the female coupling. At the latest it was 11:25 a.m. when Mr. Litt started to go upstairs. (R.T. pp. 224-225.)

John Schirmeister, an appliance service man, arrived at petitioner's residence at approximately 11:30 a.m. on June 21. He parked his truck between the Mann residence and one to the north. Mr. Schirmeister got out of his truck and did not see Mr. Litt. (R.T. pp. 183-184, 187, 189.)

Mr. Schirmeister knocked on the front door and rang the doorbell to the Mann residence. He did not observe any notes on the front door of the residence. Mr. Schirmeister had been told that if no one answered the door he should go upstairs to the Litt apartment and they would let him in. However, petitioner opened the door to let Mr. Schirmeister in. (R.T. pp. 184, 188.)

Mr. Schirmeister went to the service porch where the machine was located and started to check out what the trouble was. Petitioner followed him to the service porch before leaving Mr. Schirmeister's presence. To Mr. Schirmeister, petitioner did not appear to be sick in any way. Petitioner did not complain of being sick. (R.T. pp. 184, 190-191.)

Mr. Schirmeister was at the Mann house approximately two hours. During that time he saw Mrs. Litt but did not see what appeared to be a five-year-old girl or four-year-old boy inside the residence. However, from where Mr. Schirmeister was working on the machine, he could not hear anything going on in the other parts of the residence. (R.T. pp. 184-189.)

Mrs. Lillian Litt received a telephone call from petitioner around 11:30 a.m. Mrs. Litt asked petitioner what he was doing downstairs, and petitioner told her that he had a cough and had not been allowed to work with a cough. He further told Mrs. Litt that

the repairman was downstairs. Mrs. Litt replied, "Okay. I will be down in a little while." (R.T. p. 155.)

Prior to 11:30 a.m. Mrs. Litt had not been downstairs. Until petitioner had called she thought petitioner was at work. Mrs. Litt had not heard the door open or close when the repairman had entered the Mann residence, and did not know how he had gotten inside. (R.T. pp. 156, 173-174.)

Mrs. Litt started downstairs. She met Mr. Litt coming up and following a conversation with him went into petitioner's residence. (R.T. pp. 156, 225-226, 241.)

Mrs. Litt saw the repairman in the service porch off the kitchen. She also saw petitioner who was wearing jeans and a shirt. Mrs. Litt stayed downstairs until around 12:30 p.m. when she went upstairs to get dressed. (R.T. pp. 156-157, 175, 178.)

Shortly thereafter, Mrs. Litt came back downstairs to ask petitioner if he wanted some lunch. On the door to the Mann residence she noticed a business card. (Minor's Exh. A; R.T. pp. 138, 349.) On the card was written, "Please come and see me, urgent." Upon turning the card over, Mrs. Litt saw that it was from "Shalom Movers." (R.T. p. 158.)

Mrs. Litt took the card inside the house and gave it to petitioner. Petitioner said, "I'll see what they want," and walked out the front door. (R.T. p. 159.)

About five to ten minutes later petitioner returned. He said, "How do you like that. They are accusing me of raping the kid." Mrs. Litt asked, "Leonard, what are you talking about?" Petitioner replied, "Yeah. Mr. Shalom said that he is going to call the defense league." Mrs. Litt stated, "Give me that card. I will see what this is all about." (R.T. p. 160.)

Mrs. Litt proceeded to the next door house and knocked at the kitchen door where she got no answer. She then went to the door to the living room where she saw a note reading, "If nobody answers the door, I'm in my office in back of the house." (R.T. pp. 160-161.)

Before Mrs. Litt could go back to the office, the door opened and two women, Rose Manela and a Mrs. Amster, came out. Mrs. Litt asked what was happening. Mrs. Manela stated that petitioner had tried to rape the little girl. Mrs. Litt stated, "When did all this take place? The kid is never home, he goes to school, from school he goes to work. When was this supposed to be?" Mrs. Manela replied, "Today." Mrs. Litt answered, "How can it be today? The kid is sick. He went to work and he came home sick from work." Mrs. Manela stated, "That's the way it is." Before Mrs. Litt could say anything else Mrs. Amster added, "Yes, it's today. It happened today." (R.T. pp. 162-163.)

Mrs. Manela seemed to be upset. Mrs. Litt asked Mrs. Manela not to call the Jewish Defense League or do anything until her daughter got home. She also said she did not want to tell her husband because he was a sick man. Mrs. Manela replied, "Look, I'm not looking for trouble. I just called up the police department. I didn't give any names, I just told them what happened, and I asked them what to do about it." Mrs. Litt again asked Mrs. Manela not to do anything until Mrs. Litt's daughter could come over and talk. She also asked when the incident occurred and was told that it was at "11:30." (R.T. p. 163.)

Mrs. Litt returned to her residence whereupon she remembered that the repairman had been there. She and Mr. Litt returned to Mrs. Manela. (R.T. p. 165.)

Mrs. Litt told Mrs. Manela, "Gee, the repairman was there, it couldn't have happened." Mr. and Mrs. Litt suggested that Mrs. Manela take Perele to a doctor. Mrs. Manela said she did not want to take her. She said she had examined the child and had found no blood. Mrs. Manela added, "I just want you to keep Leonard away from her." Mr. Litt replied, "But the kid is never home." (R.T. pp. 165, 227, 229.)

Mr. and Mrs. Litt left the Manela house with the agreement that when the Litts' daughter returned home from work they would all talk about the incident at the Manela house. (R.T. p. 166.) Petitioner had called his mother at work at 9:30 a.m. to tell her that he was at home. Mrs. Mann returned home from work around 4:30 to 4:45 p.m. Upon entering her residence, petitioner related to her what had occurred that day. (R.T. pp. 263-265.)

Mrs. Mann and Mrs. Litt went to the Manela residence around 5:30 p.m. They first talked to Mr. Manela and later to Mrs. Manela. (R.T. pp. 166-167, 265-266.) Mrs. Mann was defensive of petitioner. She told Mrs. Manela that she was extremely concerned about all the children on the block, but was more concerned about petitioner because if there was a problem she intended to get medical assistance for petitioner. Petitioner had in fact denied doing anything. (R.T. pp. 266-267, 274.)

Hugh Halford, a police officer for the City of Los Angeles, arrived at 415 North Stanley at approximately 7:30 p.m. on June 21, 1976, in response to a radio

call regarding an attack having been committed there. At approximately 8:50 p.m. he spoke to Mr. Manela, Mrs. Manela, and Perele. (R.T. pp. 204-205, 212.)

There was an indication that sexual molestation had occurred as to Perele. The little girl said that she had been crying. She told Officer Halford that the attacker had "[l]aid on top and held me." She also said that when it hurt she struggled and yelled. Officer Halford understood this to mean that there had been a struggle, "[a]s much as there can be a struggle between a five-year old and a sixteen-year old." (R.T. pp. 205, 211.)

Perele used the words "looney" or "nooney" to describe her vaginal area. She also told Officer Halford that petitioner had gotten her all wet. Perele stated that petitioner had played hospital or emergency on prior occasions. Perele was vague as to time although the dates of June 19 and June 20 were determined by talking to Mrs. Manela. Officer Halford took Perele's panties and dress into evidence. (R.T. pp. 207-210.)

Rosalin Tatkin was the director of a child care center at Westside Jewish Community Center. The children at the center were boys and girls from five to seven years of age. Petitioner worked at the center as an assistant to a group leader. His function was to help the children in whatever way he could. (R.T. pp. 192-193.) Petitioner worked there after he got out of school, arriving at approximately 2 p.m. every day except Saturday and Sunday when the center had no programs. Petitioner would come by car or motorcycle. (R.T. pp. 194, 196, 198.)

There had never been an incident of sexual misconduct involving petitioner and other children. To

Miss Tatkin's knowledge, however, petitioner was never alone for any extended period of time with an individual child at the facility. The work was group work and the group leader was always around somewhere. (R.T. pp. 194, 196.)

Miss Tatkin could not remember petitioner being sent home sick on June 21, 1976. She did remember petitioner calling her to say that he had a cough, but could not remember the date. (R.T. pp. 197-198.)

Ray Lambert was a scout master for the Boy Scouts of America. Petitioner was one of the scouts in his group. Petitioner had always been truthful and active in the group. (R.T. p. 147.) Mr. Lambert had not heard of any incident of sexual misconduct involving petitioner and any cub scouts, boys in the eight- to nine-year-old range. On June 21, 1976, at approximately 11:00 or 11:30 a.m., Mr. Lambert did not recall where he was and did not know where petitioner was. (R.T. pp. 152-153.)

According to Mrs. Mann, petitioner owned a motorcycle as did several other boys on the block. Petitioner's cough later developed into pneumonia which petitioner had for almost two weeks. (R.T. pp. 269-270.) Mrs. Mann and petitioner had not had frequent discussions about sex. When petitioner had been in the seventh grade, four years prior to the incident, he had attended a health class in which the human body was discussed. Mrs. Mann and petitioner had some discussions about sex at that time. (R.T. pp. 268-269.)

Mrs. Mann knew that a Mr. Amster and his seven-year-old daughter lived in the house adjacent to the Manns. In January of 1976, she had a conversation

with Mr. Amster concerning possible sexual misconduct. As a result of that conversation, Mrs. Mann had spoken with petitioner. (R.T. p. 274.)

Mrs. Mann did not believe that Mr. Amster's allegation was true. Mrs. Mann did not believe that Perele Manela's allegation was true. (R.T. p. 280.)

Richard Miller, a licensed physician in the State of California, specializing in adult and adolescent psychiatry, had occasion to talk to petitioner on August 4, 1976, for approximately 45 minutes and on August 23, 1976, for approximately 45 to 50 minutes. He had also spoken to petitioner's mother for about 20 minutes. (R.T. pp. 83-85.)

Dr. Miller found petitioner to have a rather stable personality development regarding sex and sexual outlets. Petitioner was "very inexperienced" and somewhat naive and uncurious about sex. His activities as an explorer scout and with motorcycles seemed to have consumed a tremendous amount of his libidinal energies. (R.T. p. 86.)

Dr. Miller had worked with adolescents accused of sex molestation offenses. He had found such boys to have very poorly formed identities and very weak self-esteems, to be markedly depressed, and to have an extreme amount of guilt over the nature of the sexual behavior with which they had been charged. Dr. Miller found such boys usually had been dominated by very harsh, attacking women and usually had serious maladjustments in school, often being involved with criminally delinquent activity. (R.T. p. 87.)

According to Dr. Miller, petitioner was remarkably free of depression or guilt regarding the behavior with which he was charged. He was ashamed about the

charges, but Dr. Miller "picked up very little" as to remorse or guilt, and only an amount of depression correspondent to the stress petitioner was undergoing. (R.T. pp. 87-88.) There was "really no history" of any type of serious maladjustment and "certainly no history" of delinquent behavior. Based upon his interview, Dr. Miller concluded that it would be very unlikely that petitioner had participated in an act of sexual molestation. (R.T. p. 88.)

Dr. Miller found that it would have been "very rare" for petitioner to have had discussions with anybody about sex. It would have been contrary to the information Dr. Miller had for him to have learned that petitioner's mother frequently discussed sex with petitioner. Dr. Miller's evaluation of petitioner's personality and interest in sex would in some instances have been incongruous to the assumption that petitioner's mother frequently discussed sex with petitioner, assuming that petitioner conversed as opposed to his mother lecturing. (R.T. pp. 90-91, 92.)

Petitioner did not tell Dr. Miller that his mother talked to him frequently about sex. Dr. Miller did not recall petitioner's mother indicating such discussions occurred. (R.T. p. 92.)

Petitioner testified in his own behalf. On June 19, 1976, he left home on his motorcycle at approximately 7 a.m. in order to go to his cousin's house in Northridge. The trip took about an hour. From about 8 a.m. to 4 p.m. petitioner helped his cousin move. (R.T. pp. 284-285.)

Prior to making a second trip, petitioner developed a bad headache. He decided to go home and try to sleep it off. (R.T. p. 286.) Petitioner arrived home

a little after 5 p.m. After putting away his motorcycle, petitioner went into his room to lie down. He fell asleep for an hour to an hour and a half. Thereafter petitioner had something to eat and watched television the rest of the night during which time his mother periodically would check in petitioner's room. (R.T. pp. 286-287.)

On June 19, Perele Manela was not in petitioner's house. During that day he had no contact with her. (R.T. p. 287.)

On June 20, petitioner still had the headache. He watched television until approximately 2 p.m. At that time he felt better, got dressed, and went out to the back yard to write a letter. Upon finishing the letter, petitioner read it to his mother and grandfather. (R.T. pp. 287, 289.)

Petitioner went back to the garage to listen to his scanner. After a while petitioner returned to the house in order to watch a movie. Following the movie petitioner went back to the garage in order to put an extra set of lights on his motorcycle. (R.T. pp. 289-290.) A call came in regarding a structure fire on Melrose between 5 and 6 p.m. Petitioner went to the fire where he remained for about an hour. Petitioner returned home between 8 and 9 p.m. (R.T. pp. 290-292.)

Petitioner went to the fire because his headache had almost gone and his cough was not bad enough to worry him. When petitioner arrived home from the fire, his motorcycle blew a fuse. He was unable to locate any fuses and decided to look for some the following morning before going to work. (R.T. pp. 292, 294.)

Perele Manela was not in petitioner's residence all day on June 20. He had seen her playing in front of her house when he had arrived at his house at 8:30 or 9:00 p.m. Petitioner did not talk to or touch Perele on June 20. (R.T. pp. 294-295.)

On June 21, petitioner got up at approximately 25 minutes before 8 a.m. Petitioner planned to go to work at the Westside Jewish Community Center. He got dressed, had something to eat, and went to the center by bus, arriving at approximately 8:15 or 8:20 a.m. (R.T. pp. 296-298.)

Petitioner went into the child care office and talked to Rose Tatkin. She advised petitioner that he should not work that day because his cough was bad and she did not want him to spread it. Petitioner left the center at around 9:30 a.m. (R.T. pp. 298-299.) Petitioner went into the house and called his mother to tell her what had happened. Mrs. Mann told petitioner, "Okay." Petitioner then went into his room to lie down since he was tired and had not slept well the night before. (R.T. p. 299.)

Petitioner got up between 10:00 and 10:15 a.m. Mr. Litt came into petitioner's room around 10:30 a.m. and discussed petitioner's coughing. Mr. Litt then went to the restroom and back outside. Petitioner watched a game show on television. (R.T. pp. 299-301.) At approximately 11 a.m. petitioner heard some noise in the back. He listened for the car to start or water to be turned on. He heard footsteps coming downstairs which he believed to be his grandfather's. (R.T. pp. 301, 337.) Petitioner talked to his grandfather about the two male couplings. He also actually helped his grandfather remove a coupling. He told

his grandfather that because of his cough he could not go with Mr. Litt back to Cooper's Lumber. (R.T. pp. 301-302, 343.)

Petitioner thereafter shut the door, locked it and went into the kitchen to make himself some soup. He was interrupted when the doorbell rang. Petitioner opened the door and saw the repairman whom he did not know was coming. (R.T. pp. 302-303, 323.) Petitioner called Mrs. Litt to come down because he did not know what was wrong with the machine. While the repairman was working on the machine, petitioner shut off the stove, desiring to wait until the repairman left before eating the soup. (R.T. p. 304.)

Petitioner watched television. Mrs. Litt came downstairs and talked to both the repairman and petitioner. Around noon or 12:30 p.m. Mrs. Litt went back upstairs. (R.T. p. 305.) Mrs. Litt returned at about 12:30 p.m. She showed petitioner a business card. (Minor's Exh. A.) Petitioner knew that Shalom Movers were the people living next door. He knew that Perele's father's name was Zalman, but did not know that their last name was Manela. Petitioner had not told Perele his name, but knew hers because he had heard her parents call her "Peri." (R.T. pp. 306-307.)

Petitioner went next door and talked to Zalman. Zalman told him, "I'm going to get the Jewish Defense League after you; you will never forget it. And I'm going to kick your butt." Petitioner saw Perele there. She did not say anything. She was very happy, not tearful or crying. (R.T. pp. 308-309.)

Petitioner went back home and told his grandmother about the accusation. Up to that time petitioner had seen Perele playing in the Manela back yard with

her brother and the Amster children at approximately 10 a.m. Petitioner had not said anything and did not think that they knew he was watching. (R.T. pp. 309-310.)

Petitioner did not talk to or touch Perele on June 21. Perele was not in petitioner's house. Petitioner had never played hospital or emergency with Perele. He had never taken down his pants in front of Perele or taken up Perele's dress or taken down her panties. (R.T. pp. 311-313.)

Petitioner had only touched Perele once when he grabbed her as she was about to fall off petitioner's motorcycle which he had parked in front of his house. There were quite a few kids who had motorcycles within a three-block radius of petitioner's house. These motorcycle owners had the same appearance as petitioner. (R.T. pp. 313-314.)

Petitioner at no time attempted to rape Perele. At no time on June 19, 20, or 21 did he lie on top of Perele's body. (R.T. p. 314.)

ARGUMENT

The Standard of "Sufficient Substantial" Evidence to Support a Conviction on Appeal Satisfies Due Process, and Application of the Reasonable Doubt Standard Would Constitute Retrial-by-Transcript

Petitioner seeks to use Justice Stewart's single dissent in *Freeman v. Zahradnick* (1977) 429 U.S. 1111, 1115, which suggests an expansion of *In re Winship* (1970) 397 U.S. 358, to bootstrap himself into an argument that the Due Process Clause requires state appellate courts to review cold written state trial proceedings to determine whether there was proof beyond a reasonable doubt established. (Petn. pp. 11, 16-17.) Petitioner makes this contention notwithstanding the equivocation in the lone dissent; the lack of a fundamental claim; the concomitant expansion of appellate review; the fact that such review would constitute trial-by-transcript; and the fact that *Patterson v. New York* (1977) 432 U.S. 197, and other intervening cases make it abundantly clear that *In re Winship* was never meant to overrule or in any way modify *Thompson v. Louisville* (1960) 362 U.S. 199.

Initially, respondent submits that petitioner's contentions are fallacious unless due process is extended in the area of sufficiency of the evidence far beyond its bounds elsewhere. The term "due process" has been broadly interpreted to mean fundamental fairness within our system of law. (See, e.g., *In re Winship, supra,* 397 U.S. at p. 381; *Rochin v. California* (1952) 342 U.S. 165, 169.) Due process of law protects an individual from arbitrary action of the government and action which shocks the conscience by failing to comport with traditional ideas of fair play and decency. (See, e.g., *Meachum v. Fano* (1976) 427 U.S. 215,

226.) "Traditionally, due process has required that only the most procedural safeguards be observed . . . ." (*Patterson v. New York, supra,* 432 U.S. at p. 210.) The question herein then becomes whether the standard of "sufficient substantial" evidence on state review of criminal convictions " 'offends some principle of justice so deeply rooted in traditions and conscience of our people as to be ranked as fundamental.' " (*Id.,* at p. 202.)

To render a criminal conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment, the conviction must be "totally devoid of evidentiary support." (*Garner v. Louisiana* (1961) 368 U.S. 157, 163.) As noted by Chief Justice Warren, this Court's due process inquiry does not turn on a question of evidence to support the conviction, but on whether the conviction rests upon "any" evidence which would support the finding of guilt. (*Id.,* at pp. 163-164; see also *Shuttlesworth v. Birmingham* (1965) 382 U.S. 87, 94-95; *Thompson v. Louisville, supra,* 362 U.S. 199 at pp. 204, 206.)

On appeal from conviction in California, the following test has been devised by the California Supreme Court for determining sufficiency of the evidence:

> "The [reviewing] court must view the evidence in a light most favorable to the respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] If the circumstances reasonably justify the trial court's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.] The test on appeal from a criminal conviction is whether there is substantial

evidence to support the conclusion of the trier of fact, not whether guilt is established beyond a reasonable doubt. [Citation.]

"Before the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it. . . ." (*People v. Redmond* (1969) 71 Cal.2d 745, 753 [79 Cal.Rptr. 529, 534, 457 P.2d 321, 326].)

It should be noted that federal habeas corpus review of the sufficiency of the evidence to support state court convictions utilizes the "any" evidence rule, the aforedescribed due process standard enunciated in *Garner,* and probative strength of evidence has never been permitted to be an issue in habeas corpus. (*Young v. Boles* (4th Cir. 1965) 343 F.2d 136, 138.)[5] Certainly, the much stronger standard of review by California appellate courts is within the due process standdard as enunciated by this Court. That this is true can be seen by the rule that where evidence is clearly sufficient under California standards to support a state court conviction, allegations of insufficient evidence are not reviewable by petition for writ of habeas corpus. (*Phillips v. Pitchess* (9th Cir. 1971) 451 F.2d 913, 919-920, cert. den. (1972) 409 U.S. 854; *Freeman v. Stone* (9th Cir. 1971) 444 F.2d 113, 114; *Barquera v. California* (9th Cir. 1967) 374 F.2d 177, 179-180.)

Petitioner's reliance on Justice Stewart's dissenting remarks in the denial of certiorari in *Freeman v. Zahradnick, supra,* 429 U.S. 1111 (Petn. pp. 16-17), is

[5]Federal habeas review of state court convictions is currently before this Court in *Jackson v. Virginia,* Case No. 78-5283.

misplaced. Justice Stewart was apparently only throwing out an idea; he had not decided that the reasonable doubt standard should be introduced into appellate review of convictions:

"What I am suggesting is simply that the question whether there was sufficient evidence to support a finding by a rational trier of fact of guilt beyond a reasonable doubt may be of constitutional dimension." (*Id.,* at p. 1113.)

Thompson v. Louisville, supra, was the first criminal case where the lack of evidentiary support was elevated to constitutional proportions. It seems probable that this result was prompted by the peculiar facts of *Thompson,* which included no state review, suspected persecution and harassment of the petitioner, the fact that petitioner was black, and the uncontested nature of the evidence. (See Annot. (1960) 80 A.L.R.2d 1355, 1376.) However, review of the quantitative value of evidence only requires the reviewing court to determine whether the fact finder could reasonably infer the ultimate fact of guilt from the sum of the evidence presented by the state. (See *Schware v. Board of Bar Examiners* (1957) 353 U.S. 232.) The "no", "any", or "some" evidence due process standard has been confirmed several times by this Court. (*Shuttlesworth v. Birmingham, supra,* 382 U.S. at pp. 94-95; *Garner v. Louisiana, supra,* 368 U.S. at p. 163.)

This standard has not changed since the aforementioned cases although petitioner seeks to expand the holding in *In re Winship, supra,* to the constitutionalizing of the reasonable doubt standard in state appellate review. *Winship* merely applied the traditional reasonable doubt standard at the *trial level* to juvenile proceedings—the standard is "required during the *adjudicatory*

stage of a delinquency proceeding." (*Id.*, at p. 368.) The Court had never before held that the reasonable doubt standard was constitutionally required, even in adult criminal proceedings. (*Id.*, at p. 385 (Black J., dissenting).) The Court did not state or even imply that appellate or collateral review required a finding that the trier of fact properly concluded that the standard had been met.

Four years subsequent to *Winship*, the Court was presented with an opportunity to apply the *Winship* rule to federal collateral review in *Vachon v. New Hampshire* (1974) 414 U.S. 478. Instead, the court, citing *Harris v. United States* (1971) 404 U.S. 1232, 1233 (Douglas, J., in chambers), *Thompson v. Louisville*, and other cases stated:

> "It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate[s] due process." (*Vachon, supra*, at p. 480.)

Justice Rehnquist, joined by Chief Justice Burger and Justice White, in dissent confirmed how limited due process is when applied to sufficiency of the evidence:

> "Even if appellant's sufficiency-of-the-evidence contention in the Supreme Court of New Hampshire could be said to have been presented as a federal constitutional claim based on *Thompson v. Louisville* [citation], I would nonetheless be unable to join the court's disposition of it. In *Thompson*, the only state court proceedings reaching the merits of the case were in the Louisville Police Court from which there was no right to appeal to any higher state court, and there was therefore no state court opinion written which construed the statute under which *Thompson* was convicted. This Court therefore had no choice but to engage in its own construction of the statute and upon doing so it concluded that the record was 'entirely lacking in evidence to support any of the charges.' [*Id.* at 204, 4 L.Ed. 2d 654.] *Thompson* was obviously an extraordinary case, and up until now has been saved for extraordinary situations; it has not heretofore been broadened so as to make lack of evidentiary support for only one of several elements of an offense a constitutional infirmity in a state conviction." (*Id.*, at p. 484.)

Apart from *Vachon*, the decisions between *Winship* and *Patterson v. New York, supra*, indicate that the reasonable doubt standard is not appropriate or required by due process in appellate or collateral review.

The vitality of *Winship* at the trial stage was confirmed in *Mullaney v. Wilbur* (1975) 421 U.S. 684, where the court employed *Winship* to invalidate Maine's affirmative defense of provocation. The rationale was that to require the defendant to prove provocation by a preponderance of the evidence violated *Winship's* requirement that the state prove byond a reasonable doubt "every fact necessary to constitute the crime." Manslaughter was distinguished from murder by the absence of provocation. Therefore, the Court held that at trial, Maine had to prove the absence of provocation beyond a reasonable doubt when the issue was raised by the defense.

Just two years later, however, in *Patterson v. New York, supra*, 432 U.S. 197, it became clear that *Mull-*

aney did not portend further extension of *Winship* such as to appellate or collateral review. Professor Allen has summed up his opinion why *Mullaney* should only be considered to be a temporary forage into extending the reasonable doubt standard by use of due process:

> "In his dissent in *Patterson*, Justice Powell accused the Court of 'drain[ing] *In re Winship* . . . of much of its vitality.' Justice Powell was wrong. *Patterson* did not 'drain *Winship* of its vitality'; rather, it rejected *Mullaney's* extension of *Winship* beyond the latter's legitimate boundaries, and thus it restored *Winship* to its original purpose. Careful examination of these three cases shows not only that *Patterson* rightly rejected the due process analysis employed in *Mullaney*, but also indicates the proper scope of the federal interest in the reasonable doubt standard.
>
> ". . . .
>
> "The important point to note about the *Winship* Court's treatment of burdens of proof in criminal cases is that the Court's due process analysis relied heavily on the common practice in the states and only supported the implications of that practice by reference to the interests protected. The Court attempted no thorough examination of those interests and did not purport to consider fully the states' burden-of-persuasion practices. Indeed, affirmative defenses were never even mentioned by the Court. In *Mullaney*, by contrast, the Court reversed its order of reasoning, concentrating first on the interests protected by the reasonable doubt standard rather than on whether Maine's statute 'offends some principle of justice so deeply rooted in the traditions and conscience

> of our people as to be ranked as fundamental.' This reversal of the analysis in *Mullaney* was the cause of *Patterson's* subsequent disavowal of *Mullaney*, for it had implications far beyond what *Winship* could support.
>
> ". . . .
>
> "One can now see more clearly the shift of analysis in *Mullaney* that permitted it to accomplish a result that *Winship* could not sustain. *Mullaney* invoked *Winship* not to invalidate a burden-of-proof practice demonstrably inconsistent with the 'traditions and conscience of our people,' but instead used that case in a fashion that would provide the means to invalidate a practice long accepted throughout the country. Thus *Mullaney*, which purported to 'apply' *Winship*, drastically altered that case from one that looks to traditional practice and prevailing usage by the states to aid in due process analysis to one that frees the federal courts to impose their own view about the appropriate use of the reasonable doubt standard on the states notwithstanding widely shared views to the contrary.
>
> ". . . .
>
> "Thus, one significant aspect of *Patterson* is, in short, the restoration of *Winship* to its original purpose and the concomitant refusal to permit *Winship* to be misconstrued and then employed as the basis for unjustifiable extensions of federal authority." (Allen, *The Restoration of In re Winship: A Comment on Burdens of Persuasion in Criminal Cases After Patterson v. New York* (1977) 76 Mich.L.Rev. 30, 36-40.)

The recognition in *Patterson* and *Sykes* that "common practice" supports findings of constitutionality is nothing more than a reaffirmation that due process is a very limited and basic concept:

> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine v. California,* 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " (*Patterson,* at pp. 201-202.)

The *Patterson* opinion is careful to specifically limit the parameters of the Due Process Clause as it was employed in *Mullaney:*

> "There is some language in *Mullaney* that has been understood as perhaps construing the Due Process Clause to require the prosecution to prove beyond a reasonable doubt any fact affecting 'the degree of criminal culpability.' . . . The Court did not intend *Mullaney* to have such far-reaching effect." (*Patterson,* at pp. 214-215, fn. 15.)

Petitioner argues that by adopting the reasonable doubt standard to "first level" appeals, there would

be no "actual" increase in the workload of state appellate courts which already examine the records of trial to determine whether procedural errors have occurred and, if so, whether they are harmless. (Petn. p. 19.) The crucial point omitted by petitioner is that appellate review of this type examines the facts to determine if legal errors have occurred rather than to try to determine witness credibility. The trial judge can easily apply the reasonable doubt standard because he has seen and heard the evidence and testimony firsthand. Nevertheless, this Court has held that when a trial court is ruling on the merits for a motion for acquittal, it is not to weigh the evidence or assess the credibility of witnesses. (*Burks v. United States* (1977) 437 U.S. 1, 16.)

How much more futile it would be for appellate judges to exhaustively analyze state transcripts to determine if the prosecution case was proved beyond a reasonable doubt. Such a retrial-by-transcript would be wasteful exercise:

> "A stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." (*Broadcast Music v. Havana Madrid Restaurant Corp.* (2d Cir. 1949) 175 F.2d 77, 80.)

Respondent submits that federal due process as interpreted by this Court does not require adoption of the reasonable doubt standard to review of the sufficiency of evidence of convictions by state appellate

courts. Moreover, the problems inherent in such a review militate against such a standard. The current California Supreme Court standard insures that there will be a thorough review and determination that at trial a defendant has received a fair trial and just conviction.

Conclusion

For the foregoing reasons, respondent respectfully urges that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeal

CERTIFIED FOR PUBLICATION

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

In the Matter of Leonard M., A Person Coming Under the Juvenile Court Law.

Kenneth F. Fare, Petitioner and Respondent, v. Leonard M., Appellant. 2 Civ. No. 30946 (Super. Ct. No. J-534,011)

Filed: Oct. 27, 1978.

APPEAL from an order of the Superior Court, Los Angeles County. Peter S. Smith, Judge. Affirmed.

Eliot B. Feldman for Appellant.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Edward T. Fogel, Jr., and Gary R. Hahn, Deputy Attorneys General, for Petitioner and Respondent.

A minor appeals from an order finding him to be a person within the meaning of section 602 of the Welfare and Institutions Code and directing a suitable placement for him. We affirm the order.

The order is based on a finding that the minor, a 16-year old boy, had committed a lewd act on a 5-year old neighbor girl. On this appeal he contends: (1) that the evidence does not support the finding; and (2) that he was denied the effective assistance of counsel because his trial attorney did not seek a psychiatric examination of the child. We reject both contentions.

I

The young girl testified quite positively that the minor had invited her into his home, where he was alone, and there committed an act of intercourse with her. That testimony, accepted by the trial court, was sufficient to sustain the finding.

II

However, the evidence was otherwise weak. The girl was not examined by a physician until some hours after she had complained to her mother. The examination disclosed no bleeding, an unruptured hymen, and no indication of semen, but did show a slight redness of the vagina—a fact possibly explainable by intervening events. The medical evidence was that it was medically impossible for penetration of the extent to which the girl testified to have occurred without rupture of the hymen. Psychiatric testimony on behalf of the minor was to the effect that the alleged conduct was inconsistent with his character. In short, the case against the minor rested entirely on the oral testimony of the young girl.

In *People v. Lang* (1974) 11 Cal.3d 134, dealing with a case involving several factual similarities, the Supreme Court said, in footnote 3 on page 140:

"[Citation.] Such an examination would seem a minimum protection for a defendant charged with molesting a child, and only the rarest of cases would excuse counsel from obtaining one. As the trial judge indicated in this case, shortly before finding defendant guilty, 'I don't know how bright these girls [the twins] are. I don't know what their capacity for fantasy is.' The results of a psychiatric examination of the twins might easily have tipped the balance in this close case

in favor of defendant, whose strongest defense was that the twins lied about him." That statement was quoted with approval by the Chief Justice in her dissent in *People v. Thomas* (1978) 20 Cal.3d 457, at page 472.

Based on that language, and on the weakness of the case against defendant, resting as it does on the testimony of the young girl, the minor here contends that the failure of his trial counsel to seek a psychiatric examination of the girl evidenced incompetency that deprived him of a fair trial.

We reject that contention. *Lang* did not hold that every failure to seek a psychiatric examination of an alleged victim in child abuse cases is, as a matter of law, an incompetent representation. Its holding went no further than to require *appellate* counsel to raise that matter on appeal—a duty ably performed by the appellate counsel in this case. However, as the Supreme Court pointed out in *People v. Jenkins* (1975) 13 Cal.3d 749, at pages 754-755, quoting from *People v. Garrison* (1966) 246 Cal.App.2d 343, 350-351:

". . . However, in the absence of affirmatively showing that counsel acquiesced through ignorance of the facts or the law, defendants are not entitled to relief. 'The failure of counsel to object at the trial does not ordinarily indicate either incompetence of counsel or unfairness to the client. The system of objections is a useful tool in the hands of a trained professional for the exclusion of matter which should not be received into evidence. But the indiscriminate use of objections, solely because they are available, aids neither the client nor the cause of justice. The choice of when to object and when to allow the evidence to come in as offered is inherently a matter of trial tactics. Ordinarily the

tactical decisions of trial counsel will not be reviewed with the hindsight of an appellate court. [Citations] The decisions which counsel must make in the courtroom will necessarily depend in part upon what he then knows about the case, including what his own client has told him. There may be considerations not shown by the record, which could never be communicated to the reviewing court as a basis for its decision. Thus, the appellate court's inability to understand why counsel did as he did cannot be a basis for inferring that he was wrong.' "

Since a psychiatric examination of a witness is open to use by both sides (*People v. Blakesley* (1972) 26 Cal.App.3d 723, 729), it is a two-edged sword. Nothing in the record before us indicates that trial counsel was ignorant of his right to seek a psychiatric examination; nothing in that record tells us what investigation he may have made of the ability of the girl to testify honestly and accurately. Since nothing in the record shows that the failure here complained of was not a reasoned tactical decision, we cannot hold that trial counsel was incompetent to the degree that he had reduced the hearing to a "farce or a sham," or withdrew a viable defense.

The order appealed from is affirmed.

CERTIFIED FOR PUBLICATION.

Kingsley, *J.*

I concur:

Files, *P.J.*

Jefferson (Bernard), *J.*

I dissent.

The majority finds no merit in either of the two contentions asserted by the minor on this appeal. I do. The minor's contentions are (1) that the evidence is insufficient to support the finding that the minor committed a violation of section 288 of the Penal Code, and (2) that the minor was denied his constitutional right to effective assistance of counsel at his trial.

I

Insufficiency of the Evidence

In this case before us the victim, a five-year-old neighbor girl, testified that the minor, a 16-year old boy, had actual sexual intercourse with her—not simply the commission of a lewd act. The majority concludes that since this testimony was accepted by the trial court, it ends all consideration of the issue of whether the evidence was sufficient. *Automatically,* it was sufficient to sustain the finding.

It is with deep reluctance that I must agree that our appellate courts have held that the testimony of a child complaining witness in a child molestation case, even though uncorroborated, and no matter how lacking in indicia of reliability and trustworthiness, nevertheless is sufficient to support an adult's conviction or a juvenile court's corresponding finding. It has become established law that it is the function of an appellate court "in reviewing a criminal conviction on appeal to determine whether the record contains any substantial evidence tending to support the finding of the trier of fact, and in considering this question we [the appellate court] must view this evidence in the light most favor-

able to the finding. [Citation.] The test is not whether guilt is established beyond a reasonable doubt. [Citations.]" (*In re Roderick P.* (1972) 7 Cal.3d 801, 808.) This same principle of appellate review is applicable to juvenile court proceedings. (*In re Roderick P., supra,* 7 Cal.3d 801, 809.) In my view, the test on appellate review ought to be whether guilt is established beyond a reasonable doubt.

But instead of the test being whether guilt is established beyond a reasonable doubt, the appellate court makes a determination of whether a *reasonable* trier of fact *could* have found that the prosecution had established the defendant's guilt beyond a reasonable doubt. However, " ' "in determining whether the record is sufficient in this respect the appellate court can give credit only to 'substantial' evidence, *i.e.,* evidence that reasonably inspires confidence and is 'of solid value.' " ' " (*In re Roderick P., supra,* 7 Cal.3d 801, 809.)

Herein lie the seeds that so easily may sprout injustice to a defendant or minor charged with the commission of a child molestation offense. What constitutes "substantial" evidence—evidence that is supposed to reasonably inspire confidence? What is evidence of "solid value"? There is no doubt that the decisional law has sanctioned the view that a child complaining witness' testimony, though suspect and permeated with indicia of untrustworthiness and unreliability, constitutes "substantial" evidence that reasonably inspires confidence and is of "solid value," simply and solely because a trial judge chose to believe such testimony. Although I deplore and detest the offense of child molestation, I cannot agree with the principle of appellate review that permits a trial judge to convert such untrustworthy

and unreliable testimony into "substantial" evidence when such evidence cannot possibly reasonably inspire confidence and is totally lacking in "solid value."

In my judgment, the victim's testimony in the case at bench does not constitute "substantial" evidence. It is not "evidence that reasonably inspires confidence and is of solid value." It is of significance that the majority points out and admits thut the prosecution's evidence was weak in that the medical evidence established that it was medically impossible for the minor to have had sexual intercourse with the victim as described by her in her testimony. She still had an unruptured hymen after this alleged incident, and there was no indication of any bleeding or semen present. In addition, the five-year old victim's testimony was rampant with discrepancies and inconsistencies.

For the appellate courts to cling to a rule of appellate review that permits this kind of testimony to amount to " ' " 'substantial' evidence, i.e., evidence that reasonably inspires confidence and is 'of solid value' " ' " (*In re Roderick P., supra,* 7 Cal.3d 801, 809) constitutes a perpetuation of injustice to a defendant convicted upon such testimony or to a minor declared to be a ward of the juvenile court as the result of such testimony. In my view the appellate courts should no longer follow the rule that, irrespective of its established lack of credibility and trustworthiness, the testimony of a complaining child witness in a child molestation case is deemed sufficient to sustain a finding of guilt on the part of an adult or a finding of a violation of the pertinent criminal code section by a minor in a juvenile court proceeding.

In making a determination of whether the testimony of a child complaining witness in a sex molestation case had within it the requisite indicia of reliability to preclude an appellate court from finding that it fails to satisfy the test of "substantial evidence"—evidence that is capable of inspiring confidence and is of solid value—there should be no distinction between such testimony as direct evidence and evidence that is circumstantial evidence or hearsay evidence that is admitted under some exception to the hearsay rule. I thus fail to see how the direct evidence in the form of the testimony of the child complaining witness in the case at bench is any more reliable under the circumstances presented than the evidence of the prior unsworn, out-of-court statements given by an apparent accomplice and repudiated, but which becomes admissible under the exception to the hearsay rule for prior inconsistent statements found in *In re Eugene M.* (1976) 55 Cal.App.3d 650. The proof in the *Eugene M.* case was found to be " 'so fraught with uncertainty as to preclude a confident determination of guilt beyond a reasonable doubt.' "(*Id.* at p. 659.) The prosecution's evidence in *Eugene M.* thus failed "to meet the necessary standard that it inspire confidence and be of solid value." (*Ibid.*) As in *Eugene M.*, the prosecution's evidence in the case at bench comes within the principle that "[e]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

II

The Constitutional Inadequacy of the Minor's Trial Counsel

The minor's contention that he was denied his constitutional right of effective assistance of trial counsel is predicated on the fact that his trial counsel failed to make a *Ballard* motion to have the trial court appoint a psychiatrist to conduct a psychiatric examination of the child complaining witness. (See *Ballard v. Superior Court* (1966) 64 Cal.2d 159.) The majority holds that there is nothing in the record before us to lead to a conclusion other than that the failure of defendant's trial counsel to seek a psychiatric examination of the child complaining witness was anything other than a "reasoned tactical decision." I consider this view of the majority to be erroneous, untenable and a misapplication of the rules of law pertaining to what constitutes ineffective assistance of trial counsel to deprive a criminal defendant of his constitutional rights.

The majority recognizes that the seminal case of *Ballard* held that trial judges possessed a discretion to order a psychiatric examination of complaining witnesses in sexual offense cases in order to provide defendants with evidence to attack the credibility of such witnesses. Since the *Ballard* court talks about the discretionary power of the trial court to order a psychiatric examination of a complaining witness, the majority seems to assume that had the minor's attorney sought a psychiatric examination of the five-year old complaining witness, the trial judge could have exercised a valid discretion and denied the request. It is my view that because of the crucial posture of the issue involved —the credibility of this five-year old complaining

witness contrasted with the credibility of the minor and his defense witnesses, it would have been a gross abuse of discretion for the trial court to have denied a motion made by defense counsel for such a psychiatric examination.

As pointed out by the *Ballard* court, "Professor Wigmore, in a widely quoted passage, stated, 'No judge should ever let a sex-offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician.' (3 Wigmore, Evidence, *supra,* 460, italics omitted.) [6] This concern is stimulated by the possibility that a believable complaining witness, who suffers from an emotional condition inducing her belief that she has been subjected to a sexual offense, may charge some male with that offense. *Thus, the testimony of a sympathy-arousing child may lead to the conviction of an unattractive defendant, subjecting him to a lengthy prison term.*" (Emphasis added.) (*Ballard, supra,* 64 Cal.2d 159, 172.)

In *People v. Lang* (1974) 11 Cal.3d 134, 140, fn. 3, the court expounded upon its views set forth in *Ballard* by stating: "Such an examination would seem a minimum protection for a defendant charged with molesting a child, *and only the rarest of cases would excuse counsel from obtaining one.*" (Emphasis added.) That a psychiatric examination of an alleged child victim who testifies to a molestation by a defendant is of acute importance and significance is emphasized in *People v. Thomas* (1978) 20 Cal.3d 457, 472, in which it was stated: "While this court in *Ballard* specifically refrained from requiring such an examination in every type of sexual offense case, it later explained that a *Ballard*-type examination '. . .

would seem a minimum protection for a defendant *charged with molesting a child,* and only the rarest of cases would excuse counsel from obtaining one.' [Citation.]" (Concurring opinion.) (Emphasis in original.)

The rules with respect to what constitutes a constitutional inadequacy of trial counsel appear to be fairly well established. As we stated in *In re Julius B.* (1977) 68 Cal.App.3d 395, 402, "[t]he trial must, because of counsel's inadequacy, have been reduced to a 'farce or a sham.' (*People v. Ibarra* (1963) 60 Cal.2d 460, 464 [34 Cal.Rptr. 863, 386 P.2d 487]; *People v. Reeves* (1966) 64 Cal.2d 766 [51 Cal.Rptr. 691, 415 P.2d 35].) An *errorless* trial is not the standard (*In re Saunders, supra,* 2 Cal.3d 1033, at p. 1041), and an unfortunate choice of trial strategy has been held, on occasion, not to constitute the type of inadequacy necessitating reversal. As *People v. Floyd* (1970) 1 Cal.3d 694, 709 [83 Cal.Rptr. 608, 464 P.2d 64] so cogently stated: 'It is not sufficient to allege merely that the attorney's tactics were poor, or that the case might have been handled more effectively. [Citations.] [¶] Rather, the defendant must affirmatively show that the omissions of defense counsel involved a critical issue, and that the omissions *cannot be explained on the basis of any knowledgeable choice of tactics.*' . . ." (Emphasis in original.)

In the case at bench the minor's defense, presented through a number of witnesses including the minor's own testimony, was a complete denial of having committed the offense. The defense was substantially an alibi. In this situation the credibility of the five-year old complaining witness, as contrasted with the credibility of the minor and other defense witnesses, became

the crucial determination for the guilt or innocence of the minor. Under these circumstances, a failure by the minor's trial counsel to seek a psychiatric examination of the five-year old complaining witness which might cast doubt on the credibility of her testimony and thus support the credibility of the minor and his defense witnesses, constitutes a withdrawal of a crucial defense just as effectively as if no testimony at all had been introduced by defense counsel in an effort to prove the minor's denial defense.

We stated in *People v. Rodriguez* (1977) 73 Cal. App.3d 1023, 1031-1032: "There is no magic formula for applying the rule that inadequate representation must reduce the trial to a farce or a sham before it amounts to a constitutionally inadequate representation. There is no logical distinction between the situation of counsel's inadequate preparation that results in the introduction of *no* testimony on a crucial defense and counsel's inadequate preparation that results in a failure to consider the introduce *corroborating* evidence needed to make a crucial defense, such as an alibi, substantial and effective. A defendant's trial is reduced to a farce or sham in the latter sitution with equal effectiveness as in the former situation." (Emphasis in original.)

Apparently the majority takes the view that if the minor is to establish inadequacy of trial counsel he must prove that a pyschiatric examination of the five-year old complainting witness *would* have been such as to cast doubt upon her credibility beyond any question. In my view this is a misinterpretation of the requirement of *People v. Ibarra* (1963) 60 Cal.2d 460. I do not read *Ibarra* as holding that the *adjudica-*

tion of a defense of which a defendant has been deprived by the failure of counsel would result inexorably in the defendant's acquittal. "It is the failure to have an appropriate *adjudication* of a defense that reduces the trial to a 'farce or a sham,' and which thus renders a defendant's trial fundamentally unfair—in violation of the constitutional due process rights guaranteed to a defendant." (*Rodriguez, supra,* 73 Cal.App.3d 1023, 1028.)

Thus, in *In re Saunders* (1970) 2 Cal.3d 1033, defense counsel in a murder case undertook no serious efforts to obtain available medical records of defendant which reflected defendant's past diagnosis and treatment for head injuries and made no effort to have defendant examined by a psychiatrist. Defense counsel decided not to present the defense of diminished capacity. In holding that defense counsel's omissions constituted ineffective assistance of counsel, the court remarked: "We cannot say, of course, what such further inquiry might have revealed. Ineed, if counsel had sought to obtain other available records and had undertaken to have petitioner examined by a psychiatrist he might well have properly concluded on the basis of information so obtained to withhold any defense based upon petitioner's mental condition at the time of the offense. On the other hand, such investigation might have produced evidence upon the basis of which counsel would have wished to present a defense. By failing to make any effort at all to follow the lead afforded by information in his possession counsel precluded himself from making a rational decision on the question." (*In re Saunders, supra,* 2 Cal.3d 1033, 1049.)

It is my view that the record in the case at bench demonstrates unquestionably that the failure of the

minor's trial counsel to seek a court-ordered psychiatric examination of the five-year old complaining witness was *not* the result of any unfortunate choice of trial strategy. This omission of the minor's trial counsel simply " '*cannot be explained on the basis of any knowledgeable choice of tactics.*' "(*Julius B., supra,* 68 Cal. App.3d 395, 402.) (Emphasis in original.)

The record reveals that the minor's trial counsel sought to elicit evidence of the five-year old complaining witness' tendency to falsify and her capacity and propensity for fantasy through cross-examination of the mother of the complaining witness. This shows that defense counsel was not completely unaware of the possibility of using the factor of a complaining witness' emotional and mental condition as a means of attacking her credibility as a witness, and, hence, that his omission to seek a psychiatric examination of the complaining witness cannot be considered a knowledgeable choice of trial tactics.

Finally, I allude to one other matter that amply demonstrates that defense counsel's omission to seek a court-ordered psychiatric examination of the five-year old complaining witness cannot logically be attributed to a choice of trial tactics. I refer to the trial court's comment on defense counsel's performance in the case at bench. During the disposition hearing the juvenile court judge stated on the record: "and, furthermore, very candidly I got the distinct impression throughout the trial, Mr. [defense counsel], that you were not overly experienced in criminal and juvenile matters, . . ."

It seems to me that our high court's view in *People v. Lang, supra* demonstrates, with inexorable logic and compulsion, that defense counsel in the case at bench

should have sought a psychiatric examination of the five-year old complaining witness if he was to give the minor the effective assistance of trial counsel which is constitutionally required. When the court in *Lang* made the statement that "[s]uch an examination [a psychiatric examination of the complaining witness] would seem a *minimum* protection for a defendant charged with molesting a child, and only the rarest of cases would excuse counsel from obtaining one" (*Lang, supra,* 11 Cal.3d 134, 140, fn. 3) (emphasis added), I see no basis for a conclusion that, in the case before us, a psychiatric examination of the complaining witness was *not* needed as a minimum protection for the minor who was charged with child molestation. Nor do I see how the instant case can be classified as falling within the exception of being one of those rare cases which would excuse defense counsel from seeking to obtain such a psychiatric examination.

On the contrary, the record before us is such that the conclusion is inescapable that if there exists *any* case in which a psychiatric examination of the child complaining witness is required in order to provide a defendant or a minor in a juvenile court proceeding with a crucial defense, it is the case at bench. I would thus hold that the minor before us has been deprived of his constitutional right to effective assistance of trial counsel.

III

Disposition

Since, in my view, the evidence was insufficient to sustain the juvenile court's finding that the minor had committed a violation of Penal Code section 288, I would reverse the orders of the juvenile court with instructions to dismiss the petition. A second trial would

be in violation of the minor's constitutional right against double jeopardy

In *Burks v. United States* (1978) ..... U.S. ....., 57 L.Ed.2d 1, 98 S.Ct. ....., our nation's highest court declared that if a reviewing court reverses a defendant's conviction on the ground of insufficiency of the evidence to sustain the conviction, the Double Jeopardy Clause of the United States Constitution precludes a retrial.

In *Burks,* the court remarked: "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow 'the State . . . to make repeated attempts to convict an individual for an alleged offense,' since 'the constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.' [Citations.]" (*Burks, supra,* ..... U.S. ....., ..., 57 L.Ed.2d 1, 9-10; fn. omitted.)

The *Burks* court also made this significant comment: "We recognize that under the terms of the remand in this case the District Court might very well conclude, after 'a balancing of the equities,' that a second trial should not be held. Nonetheless, where the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." (*Id.* at ...., fn. 6.)

Jefferson (Bernard), *J.*